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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 938

MONOLITH PORTLAND CEMENT CO., *Petitioner*,

v.

R. A. RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE, LOS ANGELES DISTRICT, *Respondent*.

REPLY TO MEMORANDUM IN OPPOSITION

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REPLY TO MEMORANDUM IN OPPOSITION

The Government's Memorandum in Opposition is deserving of special comment on several counts.

First, and most significantly, the Memorandum tacitly acknowledges the validity of petitioner's claim that the *collateral estoppel issue* was *not* properly before this Court and was *not* decided by it. In view of this tacit admission, as well as the Government's inability to offer any justification whatever for the action taken by the court below with respect to the collateral estoppel issue, it seems beyond dispute that petitioner

is entitled, at the very least, to have the decision below vacated and the case remanded for consideration of this issue.

All that the Government can offer by way of opposition to a remand of the case on this ground is its view that the collateral estoppel issue would be decided in its favor by the lower courts, thus making a remand appear "unnecessary and undesirable." Although we strongly disagree with the Government's view as to merits of the collateral estoppel issue, we have already pointed out in our petition for certiorari that a discussion of the merits of this issue, or of any other issue, is irrelevant at this stage of the proceedings. The only question here involved—whether the losing party in a prior proceeding in this Court is on remand entitled to a hearing on issues which admittedly remain in the case—surely cannot be made to turn on a mere assertion by the party here victorious that such issues would also be decided in its favor if a hearing were to be held.

As our petition for certiorari points out, this Court's own rules and decisions, as well as a decision by the Court of Appeals for the District of Columbia Circuit, make it clear that on remand of a case such as this one, a full hearing *must* be permitted on those issues which were not properly presented to this Court for decision and which were admittedly not decided by it. Indeed, the Government's conspicuous failure to defend the reasoning and action of the court below in denying petitioner a hearing on the collateral estoppel issue conclusively confirms the validity of petitioner's claim that the court below acted in an arbitrary and totally unjustifiable manner in this regard.

Next, with respect to the "prospective only" and "existing law" issues, the Government takes a different

tack. In contrast to its position regarding the collateral estoppel issue, the Government asserts that these issues were in fact decided by this Court. Again, however, the Government ignores the unquestioned application of this Court's Rule 23, which makes it unmistakably clear that questions not properly presented in a petition for certiorari will not even be considered by this Court.

As has been shown, the "existing law" and "prospective only" issues were completely omitted from the Government's prior petition for certiorari. Only the single question of pure statutory construction was presented.* It seems apparent that, in thus narrowing its petition, the Government deliberately streamlined the case in the hope that this Court would act on the certiorari papers alone and summarily decide the single issue of statutory construction which was the real point of interest to the Government. That, of course, is precisely what this Court did.

In this light, it is difficult to understand how the Government can now argue that this Court's summary

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* The Government now seeks to gloss over this fact by referring to the "existing law" and "prospective only" issues as "issues of statutory construction." (Govt. Mem. p. 4.) It should be clear, however, that neither the "existing law" nor the "prospective only" issue is in any way a part of the statutory construction question previously presented to this Court. Rather, both of these issues arise only *because* of the construction placed upon the applicable statute by this Court, and present the question whether, *notwithstanding that construction*, other mitigating factors dictate in favor of a different result in this particular case.

Moreover, as our petition for certiorari points out, under Rule 24, as well as under this Court's decision in *Namet* v. *United States*, 373 U.S. 179, Monolith's reference to the "existing law" and "prospective only" issues in its brief in opposition could not have placed them before this Court.

opinion somehow decided the "existing law" and "prospective-only" issues as well. Under Rule 23, those issues were not properly before the Court, and, in any event, there is not a single word in the Court's opinion which suggests that they were even considered, let alone decided.

While the question presented by our petition is indeed a procedural one, it is vitally important. It involves the unjustified and unwarranted action of a lower federal court in ignoring this Court's prior mandate and in depriving petitioner of a hearing on the remaining issues in this case, at least one of which even the Government admits has never been finally decided. The action taken by the court below is in direct conflict with this Court's own rules and decisions, as well as with a decision by the Court of Appeals for the District of Columbia Circuit—conflicts which the Government itself does not deny—and represents a gross departure from the accepted and usual course of judicial proceedings. Such action constitutes a dangerous precedent, and should not be permitted to stand uncorrected.

Accordingly, the decision below should be vacated and the case remanded to the Distric Court for further proceedings which would permit a full consideration of the remaining issues in this case.

Respectfully submitted,

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